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No. 02-1672

IN THE

Supreme Court of the United States

RODERICK JACKSON,

Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Although respondent wishes it were otherwise, this Court held long ago, and has repeatedly reaffirmed, that there is a private right of action to enforce Title IX's ban on sex discrimination. *See Cannon v. University of Chicago*, 441 U.S. 677, 688-89 (1979); *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001). That case law establishes that petitioner may sue respondent for discrimination prohibited by Title IX. This case therefore presents only one, straightforward question: Does Title IX's statutory prohibition on sex discrimination encompass a prohibition on retaliation?

Petitioner demonstrated in his opening brief that the answer to that question, based on established principles of statutory construction, is yes. The text, background, and purposes of Title IX all indicate that it prohibits retaliation. That conclusion is confirmed by the statute's implementing regulations, which are entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The prohibition on retaliation is a core component of Title IX's broad ban on discrimination, and there is no reason why Congress would have permitted retaliation against those who invoke Title IX's protections.

TITLE IX PROVIDES REDRESS FOR RETALIATION

A. Ordinary Principles Of Statutory Construction Apply

Ordinary principles of statutory construction point conclusively to a result that respondent wants to avoid. So rather than argue the case under those principles, respondent (Br. 14-15, 36) and its amici States (Br. 3-5) take a different approach. They argue that ordinary rules of statutory interpretation do not apply to this case. It is not enough, they contend, for petitioner to show that retaliation is "discrimination" prohibited by Title IX, and then to rely on the established right of action to redress prohibited discrimination. Instead, they argue that, because this is a private action, peti-

tioner must also show that Congress specifically intended to create a right of action for discrimination that takes the form of retaliation, as distinct from discrimination generally.

But this Court held in *Cannon* that the rights-creating language of Section 901 of Title IX, 20 U.S.C. § 1681, establishes that Congress intended to provide a cause of action for all individuals who are subjected to discrimination prohibited by that section. *See* 441 U.S. at 690-94 & n.13. If retaliation against someone for complaining about sex discrimination falls within that textual prohibition, then the Court has *already* determined that Congress intended to provide a right of action to redress it. Thus, the critical question is whether retaliation is "discrimination" "on the basis of sex" within the meaning of Section 901 of Title IX. And that is an ordinary question of statutory interpretation, resolved by ordinary principles of statutory construction.

This Court has always applied ordinary rules in construing statutory language in cases in which the plaintiff sues under an implied right of action. In *Sandoval*, the very case on which respondent and its amici principally rely, the Court made clear that the scope of a statutory prohibition giving rise to a right of action is determined by looking to the statute itself and to regulations that "authoritatively construe the statute," just as in any other statutory interpretation case. 532 U.S. at 284. And, in two watershed Title IX cases brought by private plaintiffs under the *Cannon* cause of action, the Court used ordinary principles of statutory construction to conclude that the "discrimination" prohibited by Title IX includes sexual harassment of students by teachers, *Franklin v. Gwinnett County Public Schools* 503 U.S. 60 (1992), and students by other students, *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

In neither case did the Court follow respondent's novel suggestion and require the plaintiffs to show that Congress specifically intended to provide a right of action for sexual

harassment. *See, e.g., Franklin*, 503 U.S. at 65 (noting that *Cannon* "held that Title IX is enforceable through an implied right of action" and "[w]e have no occasion here to reconsider that decision"). Indeed, the plaintiffs could not have made such a showing. No court held that sex discrimination includes sexual harassment until well after Title IX's enactment. *See Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds*, 587 F.2d 1240 (D.C. Cir. 1978). Respondent's approach eviscerates *Cannon*, ignores *Sandoval*, and would require the Court to overrule *Franklin* and *Davis*.

Respondent's approach also makes no practical sense. It would result in a crazy quilt of statutory interpretation under which the same statutory term would mean one thing in cases involving administrative enforcement and another in private actions. Title IX contains only one prohibition of "discrimination." The term "discrimination" either includes retaliation or it does not. It cannot be that retaliation is "discrimination" in a challenge to an administrative action cutting off federal funds, but not in a private action. The Court should reject respondent's insupportable approach and apply ordinary principles of statutory construction, as it always has in interpreting Title IX.

B. Title IX's Ban On "Discrimination" "On The Basis Of Sex" Encompasses A Prohibition On Retaliation

1. When construed using established principles of statutory interpretation, Title IX's broad prohibition on sex-based "discrimination," 20 U.S.C. § 1681(a), clearly includes a ban on retaliation. Retaliation is simply one form of discrimination–conduct that treats certain people differently and less favorably than others. *See* Pet'r Br. 12-13.

Respondent's main argument in response is that retaliation cannot be prohibited discrimination because Title IX does not mention retaliation by name. But Congress used broad, general language to ensure that *all* forms of discrimi-

nation in educational programs would be prohibited by Title IX. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982). Thus, Title IX prohibits employment discrimination, sexual harassment of students by teachers, and peer-on-peer harassment, even though it identifies none of those forms of discrimination by name. *Id.*; *Franklin*, 503 U.S. 60; *Davis*, 526 U.S. 629.[1]

The States (Br. 7-10) take a different tack, arguing that retaliation cannot be a form of discrimination because discrimination is a comparative harm and retaliation is not. But a retaliation claim is comparative in precisely the same way as any other discrimination claim. A victim of retaliation–someone who suffers an injury because he or she complained about discrimination–has been harmed as compared to individuals who did not complain and suffered no injury.[2]

This Court and the courts of appeals have therefore uniformly construed broad statutory prohibitions on discrimination to encompass bans on retaliation. The courts have taken that approach in construing 42 U.S.C. §§ 1981 and 1982, Section 504 of the Rehabilitation Act, Title VI of the Civil Rights Act of 1964, and the federal employee provisions of Title VII of the Civil Rights Act and the Age Discrimination in Employment Act (ADEA). *See* Pet'r Br. 13-16. Because

[1] As respondent itself notes (Br. 10), Title IX does not mention sports, but even respondent does not argue that discrimination in sports is therefore outside the statute's ambit. Likewise respondent observes (*id.*) that Title IX does not expressly extend its protection to both men and women, but there can be no question that Title IX protects both sexes, *cf. Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

[2] Even if the States were correct in their cramped interpretation of "discrimination," Title IX also prohibits excluding individuals "from participation in" or denying them "the benefits of" an educational program or activity. 20 U.S.C. § 1681. Petitioner's removal from his coaching position would thus still be prohibited by Title IX, because he was excluded from participation in, and denied the benefits of, the high school girls' athletics program.

none of those statutes expressly prohibits retaliation, none of them would protect against retaliation if respondent and its amici were correct.

2. The principle that a prohibition on discrimination encompasses a ban on retaliation has its roots in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). Respondent (Br. 15-16) tries to undercut that principle by attacking the continued validity of *Sullivan*, but none of respondent's attacks passes muster.

Respondent incorrectly argues that *Sullivan* has been superseded by this Court's recent private right of action cases. That argument confuses *Sullivan*'s remedial holding–that there is a private right of action under 42 U.S.C. § 1982–with its substantive holding–that § 1982 prohibits retaliation against those who complain about interference with the property rights of minorities. The principle that a ban on discrimination includes a ban on retaliation rests on *Sullivan*'s substantive holding, not its remedial holding. The Court's recent cases about private rights of action do not in any way call into question that substantive holding.[3]

Respondent also erroneously suggests that *Sullivan* was undermined by *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Not only has *Patterson* been abrogated by congressional legislation, but it involved 42 U.S.C. § 1981, not § 1982, which was the focus of this Court's decision in *Sullivan*. Moreover, *Patterson* addressed only whether § 1981, which prohibits discrimination in making and enforcing contracts, covers conduct after contract formation. *Patterson*

[3] Nor do they call into question *Sullivan*'s remedial holding that § 1982 provides a private right of action. That holding is fully consistent with the Court's recent jurisprudence because § 1982 uses the rights-creating language that signals congressional intent to authorize private actions. *See Sandoval*, 532 U.S. at 288-89; 42 U.S.C. § 1982 ("All citizens of the United States shall have the same right . . . .").

casts no doubt on the principle that a ban on discrimination includes a ban on retaliation. *See* Pet'r Br. 15 n.3.

Recognizing that *Sullivan* is fatal to its position, respondent is ultimately forced to ask this Court to overrule the case. *See* Br. 16. But respondent offers no reason for the Court to take that dramatic action, for the simple reason that there is none. *Sullivan* is fully consistent with the approach to anti-discrimination statutes followed by the federal courts with success for nearly forty years.

3. Respondent also argues that retaliation is not covered by Title IX because it is not imposed "on the basis of sex" but rather on the basis of speech. Resp't Br. 7, 11, 17-18, 37.[4] But the fact that retaliation is based on speech does not mean that it is not also based on sex. When a recipient of federal funds retaliates against someone because that person complained about sex discrimination, the retaliation is based on both speech and sex. As petitioner explained in his opening brief (at 17), the retaliation against him was based on sex in two ways–it was triggered by his complaint of sex discrimination, and differential treatment based on sex gave rise to that complaint.

Indeed, respondent concedes that retaliation is discrimination based on *someone*'s sex. *See* Br. 7 (stating that petitioner "has alleged discrimination on the basis of someone else's sex"); *id.* at 18 ("the basis of his retaliation claim is the discriminatory treatment of others based on *their* sex"). Respondent nonetheless argues that, to fall within Title IX, discrimination must be based on the sex of the victim. But Title IX does not contain such a limitation. Unlike some other

[4] To support that argument, respondent relies on the district court opinion in *Litman v. George Mason University*, which was reversed by the Fourth Circuit. *See* 92 Fed. Appx. 41, 2004 WL 345758 (4th Cir. Feb. 25, 2004). Although respondent's October 26, 2004, letter to the Clerk's Office describes the reversal as "partial," the Fourth Circuit reversed the district court's ruling on the retaliation claim in its entirety.

civil rights statutes (which contain separate anti-retaliation provisions), Title IX does not state that no person shall be subject to discrimination "on the basis of *such individual's* sex." *Cf.* 42 U.S.C. § 2000e-2 (Title VII); 29 U.S.C. § 623(a) (ADEA). Title IX omits that limiting phrase. Retaliation for complaining about sex discrimination fits comfortably within Title IX's *actual* prohibition on discrimination "on the basis of sex." 20 U.S.C. § 1681.

4. Respondent and its amici try to bolster their textual argument by drawing a negative inference from the fact that Title VII contains an express anti-retaliation provision while Title IX does not. *See* Resp't Br. 7-8, 18-21, 38; States' Br. 10-13. But, as respondent admits, "Title VII and Title IX are very different." Br. 19. Those differences preclude drawing any conclusion from the lack of anti-retaliation language in Title IX. *See City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435-36 (2002) (presumption "that the presence of a phrase in one provision and its absence in another reveals Congress' design . . . grows weaker with each difference in the formulation of the provisions").

Title IX contains a broadly-worded, general ban on discrimination, while Title VII spells out in detail the specific forms of conduct that violate the statute. *See* Pet'r Br. 34-35. Because Congress did not mention any specific discriminatory practices in Title IX, the failure to mention retaliation in particular does not in any way imply that it is permissible. In addition, Title VII contains the limiting phrase "such individual's," but Title IX does not. *See* pp. 6-7, *supra*. The presence of that phrase in Title VII raises ambiguity about whether its language encompasses a broad ban on retaliation, and Congress may have included an express anti-retaliation provision to dispel that ambiguity. *See* U.S. Br. 20-21.[5]

[5] For those reasons, the States are incorrect in contending (Br. 11) that the anti-retaliation provision in Title VII is surplusage under petitioner's reading of Title IX.

The additional differences between Title VII and Title IX identified by respondent (Br. 19) also counsel against drawing a negative inference from the absence of a specific discussion of retaliation in Title IX. For example, respondent notes that the private right of action under Title VII is express, while the right of action under Title IX is implied. The implied nature of the cause of action under Title IX means, however, that Title VII's express protection against retaliation affirmatively supports interpreting Title IX to provide comparable protection. As respondent notes, related express causes of action shed light on the scope of an implied cause of action. *See* Br. 22; *see also* Leadership Conf. Br. 23-24. Not only Title VII but every major anti-discrimination statute with an express cause of action includes protection against retaliation. *See id.* at 22-23. That provides powerful support for the conclusion that Title IX also includes such protection. *See Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 178-79 (1994).

5. Respondent and its amici also argue that construing Title IX to prohibit retaliation is inconsistent with its status as Spending Clause legislation. *See* Resp't Br. 9, 21, 24-28; States' Br. 5-6. As an initial matter, Title IX is not based solely on the Spending Clause but also implements the Fourteenth Amendment. Moreover, respondent is incorrect that, under *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), a Spending Clause statute may be construed to prohibit conduct only if the conduct is mentioned specifically in the statute. To support that argument, respondent relies heavily on the *dissent* in *Davis*, a reliance that is telling. The opinion of the *Court* in *Davis*, which is controlling, makes clear that *Pennhurst* imposes no such requirement. *Davis*, 526 U.S. at 650; *see also Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985). If that were not the case, the Court's decisions in *North Haven*, *Franklin*, and *Davis*–involving employment discrimination, sexual harassment of a student by a teacher, and harassment of a student by her

peer student–would *all* be wrong. None of the conduct that those cases held to be prohibited by Title IX is mentioned expressly in the statute.

Davis and *Franklin* also establish that the Spending Clause and *Pennhurst*'s notice requirement pose no obstacle to liability (including liability for damages) for conduct that Title IX clearly prohibits, such as intentional discrimination. *Davis*, 526 U.S. at 642; *Franklin*, 503 U.S. at 74-75. As discussed above, retaliation is intentional discrimination, clearly prohibited by Title IX. *Sullivan*, and the court of appeals cases applying its reasoning across the spectrum of civil rights statutes, long ago removed any doubt that Title IX's broad prohibition on discrimination encompasses a prohibition on retaliation.

Title IX itself thus provided ample notice that respondent could not retaliate against petitioner. If further notice was needed, however, it was provided by Title IX's implementing regulations. *See Davis*, 526 U.S. at 643 (relying on regulations for requisite notice). Those regulations have always provided that retaliation is prohibited, as respondent itself concedes. *See* Br. 30 (stating that retaliation "would violate . . . the regulation"). Given the longstanding regulations, there can be no question that respondent had adequate notice that it could not retaliate against petitioner.

Moreover, as respondent's amici note, retaliation for complaining about sex discrimination is also prohibited by other statutory and constitutional provisions. *See* Nat'l Sch. Bds. Ass'n (NSBA) Br. 11-18. Respondent cannot and does not argue that it has any legitimate interest in retaliating against petitioner, and the NSBA agrees (*id.* at 10). Under those circumstances, the idea that respondent could have believed that it was free to retaliate rings hollow. *See Davis*, 526 U.S. at 644 (relying on common law of torts as providing requisite notice).

C. The Context Surrounding Title IX's Enactment Confirms That It Prohibits Retaliation

Petitioner also established in his opening brief that (1) Congress was aware that retaliation was a problem when it enacted Title IX; (2) Congress enacted Title IX against the backdrop of *Sullivan,* which made clear that Title IX's broad ban on discrimination would prohibit retaliation; and (3) Congress modeled Title IX on Title VI, which had been construed to prohibit retaliation. *See* Pet'r Br. 19-22. Only the States make any attempt to wrestle with those important points, and none of their arguments withstands scrutiny.

1. The States (Br. 15) first argue that no weight should be accorded the congressional hearing testimony describing retaliation against those who complained about sex discrimination. A witness's statement at a hearing about a statute's meaning is, of course, far less significant than a comparable statement in a Committee report. But petitioner is not relying on hearing witnesses' constructions of Title IX. Petitioner is relying on the hearing testimony only to show that Congress was aware of the retaliation problem. That is a perfectly legitimate use of the testimony, because the very reason that Congress holds hearings is to gather information about the issues on which it is legislating. *See Tennessee v. Lane*, 124 S. Ct. 1978, 1990-92 (2004) (relying on hearing testimony to demonstrate Congress's awareness of problems addressed by Americans with Disabilities Act); *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730-32 (2003) (same for Family and Medical Leave Act).

2. The States (Br. 16-18) also argue that it was unclear when Congress enacted Title IX that *Sullivan* established that a broad ban on discrimination includes a ban on retaliation. But *Sullivan* clearly held that § 1982–which prohibits discrimination in property transactions but does not contain an anti-retaliation provision–prohibited retaliation against Sullivan for advocating the rights of Freeman, his black lessee. The Court held that "Sullivan's expulsion for the advocacy of Freeman's cause" could not "be imposed" because, if it could, "Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982," and "[s]uch a sanction would give impetus to the perpetuation of racial restrictions on property." 396 U.S. at 237.

The Court went on to state that third parties are sometimes the only effective advocates of rights under the statute and that there was no question that Sullivan had "standing." *See* 396 U.S. at 237. The States argue that this statement shows that the case was only about Sullivan's standing. But, even if the statement was an additional holding concerning standing (rather than a use of the term "standing" to refer to a cause of action), it does not detract from the Court's primary holding. *Sullivan* unquestionably held that an individual could sue under § 1982 based on retaliation suffered for advocating the rights of others, even though § 1982 does not expressly prohibit retaliation. That clear holding would have led Congress to believe that the general prohibition on discrimination in Title IX would provide redress for retaliation.[6]

3. The States do not dispute that, before Title IX was enacted, Title VI had been interpreted by regulation to prohibit retaliation. Nonetheless, they disparage the proposition that Title IX should be construed in light of that interpretation as "rest[ing] entirely on inferences from Congress's silence."

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[6] Respondent argues that *Sullivan* can have no relevance to Title IX because *Sullivan* was decided after the enactment of Title VI, on which Title IX was modeled. But this Court has already concluded that *Sullivan* does inform construction of Title IX. *See Cannon*, 441 U.S. at 699 (reasoning that Congress was "thoroughly familiar with" the "unusually important [recent decision in *Sullivan*] . . . and that it expected its enactment to be interpreted in conformity with [it]"). Moreover, Title VI, which has always been interpreted by regulation to prohibit retaliation, itself embodies the *Sullivan* principle that a broad ban on discrimination includes a ban on retaliation.

Br. 19. But that proposition is *not* based on an inference from silence. It is based on affirmative statements by Title IX's sponsor, Senator Bayh, that Title IX was to be enforced as Title VI had been. *See Cannon*, 441 U.S. at 696 & n.19. The States elsewhere acknowledge that the Senator's statements are "authoritative indications of congressional intent" regarding Title IX's scope. Br. 14 (quoting *North Haven*, 456 U.S. at 527).[7]

D. Title IX's Purposes Would Be Frustrated If Retaliation Were Not Actionable

1. The conclusion that Title IX prohibits retaliation is supported not only by its text and the context in which it was enacted but also by its purposes–eliminating sex discrimination from federally-funded educational programs and protecting program participants from discrimination. As discussed in petitioner's opening brief (at 22-26), Title IX could not have achieved those purposes without prohibiting retaliation, and Congress had no reason to permit funding recipients to retaliate. Respondent's only answer to those points is the assertion that "direct victims of sex discrimination would still have a mechanism for pursuing their rights" if there were no prohibition on retaliation. Br. 12. But, as petitioner has explained, victims will be afraid to complain about discrimination if they are not protected from retaliation. *See* Br. 22-23 ("redress [for an initial act of discrimination] would be of little value because the same discriminatory treatment (or worse) could be imposed as reprisal for the initial complaint"). For precisely that reason, retaliation is a serious obstacle to elimination of sex discrimination in education. *See* Nat'l P'ship for Women & Families Br. 3-18.[8]

[7] Senator Bayh has filed an amicus brief in this case stating that Congress intended Title IX to prohibit retaliation.

[8] The absence of protection against retaliation would be particularly problematic in the sexual harassment context, because a federal funding recipient's actual notice and failure to take corrective action are prerequisites to monetary relief for sexual harassment victims. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998). Those prerequisites apply only to sexual harassment claims, based on this Court's view that they present a unique danger that a recipient will be held liable for conduct in which it did not itself engage, that it did not know about, and that it had no opportunity to prevent. *See Davis*, 526 U.S. at 640-41. Those requirements do not apply to retaliation, which is an intentional and official act that can be carried out only by someone acting with authority. Nor do they apply in other contexts in which a recipient may be found to have violated Title IX. But the Court need not address the applicability of the requirements here, since respondent has not–and could not have–claimed that it lacked notice of petitioner's complaints.

Indeed, respondent's amicus NSBA concedes that "retaliation against individuals for asserting Title IX rights would diminish the effectiveness of the statute in achieving its goal of gender equality." Br. 4; *see also id.* at 10 (agreeing that "educational institutions should not be able to retaliate against individuals for complaining about perceived gender discrimination against others").

The States do not contend otherwise. They argue instead that federal agencies could prohibit retaliation by regulation even if the Court held that Title IX does not prohibit it. *See* Br. 26-28. Petitioner shares that view, but the issue has not been resolved by this Court. *Cf. Sandoval*, 532 U.S. at 282, 286 n.6 (reserving the question whether Title VI regulations prohibiting disparate impact discrimination are valid notwithstanding the Court's holding that Title VI itself prohibits only intentional discrimination).

Moreover, the fact that the agencies might retain authority to prohibit retaliation if there were no statutory prohibition would not have enabled Congress to omit a statutory prohibition and still be certain that Title IX could achieve its purposes. Even if the agencies *could* prohibit retaliation, Congress could not have known, when it enacted Title IX, whether the agencies *would* do so. And, even if the agencies

did adopt regulations prohibiting retaliation, Congress would have had no guarantee that the agencies would not repeal the regulations at some future time.

In any event, as this Court held in *Cannon*, administrative enforcement is not sufficient to achieve Title IX's goal of protecting private individuals from discrimination. *See* 441 U.S. at 704-06; Am. Bar Ass'n (ABA) Br. 14-17. The administrative remedy–cutting off a recipient's funds–is draconian and has never been used in the history of Title IX. *See* ABA Br. 14 n.17. The deterrent effect provided by liability for money damages is therefore essential. But administrative enforcement agreements need not provide any individual relief, and discrimination victims have no entitlement to participate in investigative or enforcement proceedings. *See id.* at 14-15. Finally, given its high workload, the Department of Education's Office of Civil Rights tends to focus on systemic problems rather than individual instances of discrimination. *See* Leadership Conf. Br. 12 n.5; *Cannon*, 441 U.S. at 708 n.42.

2. Respondent argues that construing Title IX to prohibit retaliation would lead to "boundless liability." Br. 9. But a funding recipient is liable for retaliation under Title IX *only* if an individual complains about sex discrimination and the recipient retaliates against the individual because of that complaint. Liability turns on application of a well-established standard that has been applied to many civil rights statutes. *See* Pet'r Br. 25 n.6. There is no basis for respondent's dire predictions.

Nor would allowing retaliation suits render school boards reluctant to make employment decisions for fear of liability, as respondent and its amici contend. Resp't Br. 45; NSBA Br. 26-30. School boards, as state actors, are already liable for retaliation under 42 U.S.C. § 1983 based on the First Amendment, and they may also be liable under other statutory provisions. *See* NSBA Br. 10-18. Moreover, *North*

Haven established that Title IX prohibits employment discrimination. Thus, it is difficult to see how recognizing that Title IX also provides redress for retaliation will meaningfully increase litigation against or liability of school boards. Fear of unbounded liability is especially unwarranted given the modest number of Title IX retaliation cases that have been brought to date. *See* Pet'r Br. 26; N.Y. Lawyers for the Pub. Interest Br. 18-20.

E. The Regulations Reflect A Valid Interpretation Of Title IX And Are Entitled To *Chevron* Deference

Respondent (Br. 30) concedes that "the retaliatory conduct of which the Petitioner complains would violate . . . the regulation[s]" implementing Title IX, but it argues that the regulations are not a permissible interpretation of Title IX. As petitioner explained in his opening brief (at 26-31), however, the regulations reflect a reasonable–indeed, the correct–interpretation of Title IX; they were promulgated after notice and comment under an express grant of rulemaking authority; and they are therefore entitled to *Chevron* deference. Moreover, they were submitted to Congress for review, and Congress allowed them to take effect, thereby indicating that they correctly interpret Title IX.

Respondent's primary challenge to the regulations is that they are an unreasonable interpretation of Title IX because the statute clearly fails to prohibit retaliation. Br. 28-31. Respondent, however, has it exactly backwards. For all the reasons stated above and in petitioner's opening brief, it is clear that Title IX does prohibit retaliation.

Respondent (Br. 42) and the States (Br. 20-24) also argue that the regulations do not interpret Title IX but are only procedural provisions governing the administrative process. But the fact that the regulations, in large part, address the administrative process does not mean that they do not also reflect the federal agencies' view that retaliation is a form of discrimination prohibited by Title IX. The regulations do dou-

ble duty–they govern the administrative process *and* they show that the agencies interpret Title IX to prohibit retaliation. *See* U.S. Br. 17.

Both the title of the regulation addressing retaliation ("Intimidatory and retaliatory acts prohibited") and its text indicate that it is a substantive prohibition. The text also makes clear that the prohibition is not limited to the administrative process. Although the second half of the regulation prohibits retaliation for participation in the administrative process, the first half addresses retaliation more generally, stating that retaliation "for the purpose of interfering with any right or privilege secured by [20 U.S.C. § 1681]" is prohibited. 34 C.F.R. § 100.7(e) (as incorporated by 34 C.F.R. § 106.71). The regulatory language also makes clear that the agencies view retaliation and discrimination as part and parcel of the same prohibited conduct. Following a title indicating that the regulation addresses "retaliatory acts," the regulation describes such acts as "discriminat[ion.]" *Id.* ("No recipient or other person shall intimidate, threaten, coerce, or *discriminate* against any person." (emphasis added)).

The Solicitor General has told the Court that the relevant federal agencies read the regulations as reflecting the interpretation that Title IX prohibits retaliation, and agency guidance confirms that representation. *See* U.S. Br. 17; 62 Fed. Reg. 12,044 (1977); United States Dep't of Justice, *Title IX Legal Manual* 57 (Jan. 11, 2001). The agencies' interpretation of their own regulations is "controlling" because it is neither "plainly erroneous" nor "inconsistent with the regulation[s]." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citation omitted). Indeed, respondent concedes that it is at least "debatable" that the regulations "speak[] to retaliation and discrimination." Br. 43. That concession resolves the issue.

In any event, the Court need not address the regulations to decide this case. Title IX would prohibit retaliation even if the regulations did not exist, because that is the best reading of the statute, given its text, considered in light of established anti-discrimination case law, the backdrop against which Title IX was enacted, and the statute's purposes.

F. *Sandoval* Does Not Control This Case

Respondent (Br. 39-41) tries to sidestep that conclusion by asserting that this case is controlled by *Sandoval*. As petitioner described in his opening brief (at 32-34), *Sandoval* held that there is no implied right of action for conduct that a statute permits, even if such a right might be inferred from agency regulations. That holding is inapposite here because petitioner does not rely on federal regulations that have extended Title IX's protection beyond the protection provided by the statute. Instead, he invokes only the core protection of Title IX itself and relies on the right of action to enforce that protection that this Court recognized more than 25 years ago in *Cannon*. Thus, respondent's argument (Br. 41-43) that the Title IX regulations do not themselves create a right of action is beside the point. Whether or not they create such a right, petitioner does not invoke that right here.[9]

The regulations are relevant only because they "authoritatively construe [Title IX] itself." *Sandoval*, 532 U.S. at 284. Thus, although the regulations may not give rise to an independent cause of action, they "are covered by the cause of action to enforce" the statute that they interpret. *Id.* And that is the cause of action that petitioner has invoked.

G. All Victims Of Retaliation Are Covered By Title IX

Respondent and its amici also defend the judgment below on the ground that, even if Title IX provides redress for

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[9] As respondent notes (Br. 45-49), a few district courts and a dissenting judge in the Fourth Circuit have interpreted *Sandoval* the way that the Eleventh Circuit did here. But no other court of appeals has done so, the Fourth Circuit has expressly rejected that interpretation, and other courts of appeals have uniformly held or assumed that Title IX provides redress for retaliation. *See* Pet'r Br. 16 n.5 (citing cases).

retaliation, it does not provide relief for so-called "indirect" victims. Once one acknowledges that Title IX protects against retaliation, however, there is no basis–textual or otherwise–for limiting the statute's protection to those who complain about sex discrimination against themselves rather than others. *See* Pet'r Br. 36-41. Because retaliation is itself discrimination, all victims of retaliation are "direct" victims of discrimination. Moreover, if there were a distinction between "direct" and "indirect" victims, this case illustrates that it would not be as easy to draw as respondent suggests. Petitioner was personally harmed by the discrimination against the team he coached. *See id.* at 36, 41-43.

In attacking application of Title IX to "indirect" victims, respondent unsuccessfully rehashes several arguments that it invoked in its effort to show that Title IX does not protect against retaliation at all. For example, respondent argues that protection for those who protest discrimination against others cannot be squared with Title IX's "on the basis of sex" language. *See* Br. 33-36 (permitting indirect victims to bring retaliation claims would transmute "on the basis of sex" into "on the basis of anything"). Here again, respondent's argument depends on importing absent language into the statute. There might be some basis for limiting the retaliation protection to those who protest discrimination directed against themselves if Title IX provided that no person shall be subject to discrimination "on the basis of *such individual's* sex." But Congress did not include that limiting language. *See* Pet'r Br. 37; pp. 6-7, *supra*.

Respondent (Br. 27) also revisits its flawed Spending Clause argument. But that argument fails here for the same reason it fails more generally: retaliation (whether directed against those who complain about discrimination against themselves or those who complain about discrimination against others) is a form of intentional discrimination. Respondent therefore had ample notice that Title IX prohibits it. *See* pp. 8-9, *supra*. Moreover, nothing in the statutory

language, regulations, or precedent distinguishes between those who complain about personal discrimination and those who complain about discrimination against others. Thus, because respondent had ample notice that retaliation is generally prohibited, it had ample notice that retaliation against those who advocate for the Title IX rights of others is prohibited.

Respondent rouses the specter of unlimited liability for claims brought by "indirect" victims of retaliation. *See* Br. 36 (arguing that "every employee could file a lawsuit based on their observations rather than their personal injury or harm" and Title IX would "embrace any employee who ever complained about someone else's troubles, whether real or imagined"). That fear is groundless. Individuals cannot file Title IX retaliation claims "based on their observations." They can only do so if they are victims of retaliation–in which case they have suffered "personal injury or harm." Coverage for retaliation does not mean that Title IX provides relief for "any" employee who complains "about someone else's troubles, real or imagined." It means only that a person can seek relief if he or she suffers retaliation after complaining "in good faith and with a reasonable and sincere belief that he or she is opposing unlawful discrimination" under Title IX. Pet'r Br. 26 n.6 (quoting *Talanda v. KFC Nat'l Mgmt. Co.*, 140 F.3d 1090, 1096 (7th Cir. 1998)).

Moreover, protecting all victims, including those not directly affected by initial discrimination, would not impermissibly expand the class of Title IX beneficiaries, as the States contend (Br. 28-30). Title IX's beneficiaries include all those subjected to "discrimination" "on the basis of sex." 20 U.S.C. § 1681. That language embraces all those who suffer retaliation for complaining about sex discrimination, whether against themselves or against others. The same is true of the regulations, which, contrary to respondent's contentions (Br. 35), provide no basis for restricting retaliation protection to "direct" victims. *See* Pet'r Br. 37-38.

Finally, contrary to the NSBA's contention (Br. 4-18), retaliation protection for those who protest discrimination against others is critical to Title IX's effectiveness. If they fear retaliation, those who witness discrimination will not bring the problem to the attention of authorities who can correct it. And it is not sufficient to rely for enforcement of Title IX on only those who suffer discrimination directed against themselves. The victims of Title IX discrimination are often students and minors, who may be poorly situated to recognize discrimination or to complain about it. *See* Pet'r Br. 40-41; ABA Br. 17-19; Nat'l Educ. Ass'n Br. 4-12, 15-16; Women's Sports Found. Br. 20-22, 23-24. Girls like those on petitioner's team need advocates like him to stand up for their right to equal treatment. If teachers and coaches like petitioner are prevented from complaining about Title IX violations, one of the most effective means of enforcing the statute will be lost.

CONCLUSION

For the reasons stated above and in petitioner's opening brief, the judgment of the court of appeals should be reversed.

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